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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/877,757	06/08/2001	Elizabeth Varriano-Marston	MARS93-DIV	3933

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MAINE & ASMUS  
100 MAIN STREET  
P O BOX 3445  
NASHUA, NH 03061-3445

EXAMINER

PATTERSON, MARC A

ART UNIT	PAPER NUMBER
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1772

DATE MAILED: 05/15/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/877,757

Applicant(s)

VARRIANO-MARSTON,  
ELIZABETH

Examiner

Marc A Patterson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 24 February 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-14, 21 and 22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-14, 21 and 22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 8,9.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### WITHDRAWN REJECTIONS

1. The 35 U.S.C. 112 second paragraph rejection of Claims 1 – 9 and 12 – 14, 35 U.S.C. 102(b) rejection of Claims 1 – 3, 5 – 12, 14 and 21 – 22 as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156), 35 U.S.C. 103(a) rejection of Claim 13 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156). 35 U.S.C. 103(a) rejection of Claim 4 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156) and further in view of Clarke et al. (U.S. Patent No. 6,376,032), of record on page 2 of the previous Action, are withdrawn.

### REPEATED REJECTIONS

2. The 35 U.S.C. 112 second paragraph rejections of Claims 10 – 11, of record on page 2 of the previous Action, are repeated.

### NEW REJECTIONS

#### ***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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4. Claims 1 – 4, 8 – 9, 12 – 13 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Kocher et al (U.S. Patent No. 5,919,547).

With regard to Claims 1 and 8, Kocher et al disclose an improved packaging (column 8, lines 61 – 66) for establishing optimum atmospheric conditions for respiring produce (a modified atmosphere packaging environment for fruit; column 9, lines 5 – 17; column 18, lines 55 – 63) comprising a polymeric material (a lid comprising a laminate; column 10, lines 49 – 51) and a set of microperforations on a target area on the polymeric material (located on the lid, therefore in a registered target area; column 17, lines 66 – 67; column 18, lines 1 – 5), the microperforations controlling the optimum atmospheric conditions within specified oxygen and carbon dioxide concentrations (column 18, lines 35 – 63).

With regard to Claim 2, the polymeric material is polyester (column 15, lines 35 – 52).

With regard to Claim 3, the polymeric material is heat – sealable (heat – weldable; column 4, lines 5 – 9).

With regard to Claim 4, the polymeric material has a thickness in the range of 0.4 to 8 mil (column 17, lines 11 – 16).

With regard to Claim 9 the packaging is comprised in a lid, as stated above, therefore in a semi – rigid container.

With regard to Claim 12, the film disclosed by Kocher et al is gas – permeable, as stated above, and is therefore not occluded.

With regard to Claims 13 and 21, the microperforations have an average diameter of 125 microns (column 17, lines 66 – 67).

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***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 5 – 6, 14 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kocher et al (U.S. Patent No. 5,919,547).

Kocher et al discloses a microperforated packaging as discussed above. With regard to Claims 5 – 6, 14 and 22, Kocher et al fail to disclose a packaging material providing an oxygen flux ranging from 200 cc/day – atm to 1,500,000 cc/day – atm, and a carbon dioxide transmission rate that is 3.4 to 4.0 times greater than the oxygen transmission rate. However, Kocher et al disclose a packaging material providing an oxygen flux ranging from at least 1 cc/day – atm (the packaging provides an oxygen flux; column 17, lines 66 – 67; column 18, lines 1 – 5), and a carbon dioxide transmission rate that is equal to the oxygen transmission rate (the packaging also provides a carbon dioxide flux; column 17, lines 66 – 67; column 18, lines 1 – 5). Therefore, the oxygen flux and carbon dioxide flux would be readily determined through routine optimization by one having ordinary skill in the art depending on the desired end use of the product. It therefore would be obvious for one of ordinary skill in the art to vary the oxygen flux and carbon dioxide flux, since the oxygen flux and carbon dioxide flux would be readily determined through routine optimization by one having ordinary skill in the art depending on the desired end result as shown by Kocher et al. *In re Boesch and Slaney*, 205 USPQ 215 (CCPA 1980).

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7. Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kocher et al (U.S. Patent No. 5,919,547) in view of Porchia et al (U.S. Patent No. 5,492,705).

Kocher et al disclose a microperforated packaging as discussed above. Kocher et al fail to disclose a microperforated packaging which is a bag.

Porchia et al teach the use of microperforated packaging in a bag (column 2, lines 50 – 60) for the purpose of controlling the weight loss of fruit stored in the bag (column 2, lines 50 – 60). The desirability of providing for a bag in Kocher et al, which comprises microperforated packaging, would therefore be obvious to one of ordinary skill in the art.

It therefore would have been obvious for one of ordinary skill in the art at the time Applicant's invention was made to have provided for a bag in Kocher et al in order to control the weight loss of fruit as taught by Porchia et al.

#### ANSWERS TO APPLICANT'S ARGUMENTS

8. Applicant's arguments regarding the 35 U.S.C. 112 second paragraph rejection of Claims 1 – 9 and 12 – 14, 35 U.S.C. 102(b) rejection of Claims 1 – 3, 5 – 12, 14 and 21 – 22 as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156), 35 U.S.C. 103(a) rejection of Claim 13 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156). 35 U.S.C. 103(a) rejection of Claim 4 as being unpatentable over De Moor (U.S. Patent No. 6,013,293) in view of Kurachi et al (U.S. Patent No. 5,258,156) and further in view of Clarke et al. (U.S. Patent No. 6,376,032), of record on page 2

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of the previous Action, have been considered and have been found to be persuasive. The rejections are therefore withdrawn. The new 35 U.S.C. 102(b) rejection of Claims 1 – 4, 8 – 9, 12 – 13 and 21 as being anticipated by Kocher et al (U.S. Patent No. 5,919,547), 35 U.S.C. 103(a) rejection of Claims 5 – 6, 14 and 22 as being unpatentable over Kocher et al (U.S. Patent No. 5,919,547) and Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kocher et al (U.S. Patent No. 5,919,547) in view of Porchia et al (U.S. Patent No. 5,492,705) above are directed to amended Claims 1 – 14 and 21 – 22.

Applicant's arguments regarding the 35 U.S.C. 112 second paragraph rejections of Claims 10 – 11, of record on page 2 of the previous Action, have been carefully considered but have been found to be unpersuasive for the reasons set forth below.

Applicant argues, on page 7 of Paper No. 7, that amended Claims 10 – 11 overcome the indefiniteness rejection. However, it remains unclear exactly where the claimed 'upper portion' is located.

### ***Conclusion***

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Marc Patterson, whose telephone number is (703) 305-3537. The examiner can normally be reached on Monday through Friday from 8:30 AM to 5:00 PM. If attempts to reach the examiner by phone are unsuccessful, the examiner's supervisor, Harold

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Pyon, can be reached at (703) 308-4251. FAX communications should be sent to (703) 872-

9310. FAXs received after 4 P.M. will not be processed until the following business day.

Marc A. Patterson, PhD.

*Marc Patterson*

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HAROLD PYON  
SUPERVISORY PATENT EXAMINER  
1772

5/14/03